IN THE SUPREME COURT OF THE UNITED STATES.

IDA McCLUNG,
Plaintiff in Error.
vs.
WILLIAM A. PENNY,
Defendant in Error.

No. 384.

STATEMENT OF FACTS.

On May 14th, 1900, William A. Penny, commenced an action in the Probate Court of Kay County, Territory of Oklahoma which was, by him, termed "Complaint in Forcible Entry and Detainer," to recover of Ida McClung the possession of the south west quarter of section thirty in township twenty-six, north of range one, east of the Indian Meridian, in said county and territory. Plaintiff in the action, alleges that he was the owner and entitled to the possession of the said premises. After several orders and rulings in the case, not material at this time, plaintiff in error, the said Ida McClung, on the 26th day of May, 1900, filed her answer and plea of title in said cause, which answer and exhibits thereto present all the facts involved in the motion to dismiss the proceedings in this court, as well as the consideration of the case upon the merits.

After a general denial of the allegation of the complaint, which include a denial of the plea of title in the plaintiff in

that action, plaintiff in error, the said Ida McClung, sets out that the title to the land is in dispute between the parties and that the court has no jurisdiction to try the same as an action of forcible entry and detainer. The facts as set forth, and which are conclusively established by the decisions of the Land Department attached to the said answer, show that Ida McClung is the widow and heir at law of Charles R. McClung, who, being duly qualified under the laws of the United States to take, hold and acquire title to land in the Cherokee Outlet under the Homestead Laws, made the race from the outer boundary of the said outlet to the land in question and immediately settled upon the same, claiming it as a homestead and remained upon said land, cultivating and improving the same as his homestead, until his death on the 19th of November, 1898, and since his death plaintiff in error, Ida McClung, his widow, continued to reside upon, cultivate and improve the land as a homestead under her claims of ownership therein by virtue of the homestead laws.

Perry Birdsell was the first to file homestead entry upon the land. His entry was contested by McClung and afterwards by Penny, the defendant in error herein. On March 28th, 1894, Birdsell's entry was cancelled by relinquishment and Charles R. McClung made entry of the land. The contest proceedings thereafter was continued by Penny against the homestead entry of McClung and was carried through all the various departments and proceedings of the land department of the United States, and finally resulted in the cancellation of McClung's entry and the allowance of the homestead entry upon the land by Penny.

It appears from the answer and finding of facts by the department that at the hour of opening the Cherokee Outlet to settlement at twelve o'clock, noon, of September 16th, 1893, William A. Penny was within the outer boundary of the country known as the Cherokee Outlet and on or near the east bank of the Arkansas river, and on the western border of the Osage Indian Reservation in said Outlet, and from that point entered upon the race for the land in question, and by reason of his closer proximity and on account of his presence within the outer boundary of the Cherokee Outlet, he reached the land in advance of McClung. The facts lied upon by McClung being established by the findings of the land department, the cause presents but a single question of law, if the action was one in which the question of title could be determined. The only controversy that has ever existed between the parties or that exists in the present case is as to which of the parties actually owns the land or has the paramount interest therein under the law.

Attorneys for defendant in error contend that it is not necessary to decide this question in order to determine who was entitled to the possession of the property, and they claim that they avoid the necessity of meeting this controversy by beginning the action before a justice of the peace and calling it an action of forcible entry and detainer, at the same time admitting that if the action was pending or had been commenced before the district court upon the same state of facts, the question of title would be the matter to be determined, and in their contention they appear to be sustained by the decisions of the Supreme Court of the Territory of Oklahoma. On the other hand, plaintiff in error contends that the in-

herent nature of the controversy between the parties necessarily determines the jurisdiction of the court in which the action can be maintained to settle that controversy, as well as the scope and effect of the judgment when rendered.

Plaintiff in error, upon the answer filed and facts disclosed in the Probate Court, claims that she was entitled to have the cause transferred to the District Court by certificate of the Probate Judge to the effect that the title to real estate was involved and that the Probate Court had no jurisdiction to determine the controvehsy, it being conceded that the Probate Court has the same jurisdiction as a justice of the peace, and this relief being refused the plaintiff in error moved in the District Court, for a dismissal of the action for want of jurisdiction.

If the title to the land in controversy is in dispute between the parties and is necessarily involved in any action commenced by one party against the other, and necessarily involved and drawn in question in the present action, then this court has jurisdiction to consider the writ of error herein, because the land is admittedly worth more than five thousand dollars.

BRIEF AND ARGUMENT ON MOTION TO DISMISS.

The motion to dismiss presents the case for consideration upon the merits, if it is a proper motion to be considered at this time at all, and, as we view the law, presents the only question to be determined in this cause in this court.

Plaintiff in error contends that the title to real estate is involved and drawn in question in the controversy between the parties and that the Probate Court had no jurisdiction

to try the action. When the case was taken to the District Court on appeal the situation was the same, and the principal error complained of in the writ of error is that the Supreme Court of the Territory erroneously held and decided that the title or boundary of real estate was not involved.

The same question of jurisdiction presented to this court is the question of jurisdiction running back through the case to its inception.

It is not necessary that this court should be of the opinion, from an examination of the facts, set forth in the record, that the title claimed by the plaintiff in error is or was paramount to the title claimed by the defendant in error. It is only necessary to look far enough into the facts to see that the matter to be adjudicated is a question of title, and this court cannot properly determine how that question should be adjudicated, when properly presented, until the controversy is before the court on a judgment from a court having jurisdiction to determine that matter and permit of its being properly brought to this court.

The decision of the Supreme Court of the Territory complained of herein is not based upon the statute of the Territory and is not claimed to be a construction of any statute, but we quote the statute of the Territory, which might be considered in the determination of the motion to dismiss.

Secion 9 of the Organic Act of the Territory of Oklahoma provides that "justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter or controversy when the title or boundary of land may be in dispute."

Section 4805, Statutes of Oklahoma, 1893, is as follows:

"Any justice within his proper county shall have power to inquire in the manner hereinafter directed, as well against those who make unlawfully and forcibe entry into lands and tenements and detain the same as against those having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same, and if it be found upon such inquiry that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

And Section 4806—

"Proceedings under this article may be had in all cases against tenants holding over their term, in sales of real estate on execution orders or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sale so made on execution or otherwise shall have been examined by the proper court and the same, by said court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements, without color of title and to which the complainant has the right to possession. This section is not to be construed as limiting the provisions of the first section."

Section 4645 is as follows:

"If in any action commenced before a justice it appears to the satisfaction of the justice that the title or boundary of land is in dispute in such action, such action shall be stayed before said justice, and said justice shall, within ten days thereafter, certify said case and transmit all papers and process therein to the clerk of the district court of his county and said case shall be docketed and thereafter proceeded with in the district court as if originally commenced therein; the justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts, constituting his defense of said title or

boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is *bona fide*, and not made for vexation or delay but for the promotion of justice."

Subdivision five of Section 4646 provided that:

"Justices shall not have cognizance in any action in which title to real estate is sought to be recovered or may be drawn in question."

The difference between the contention of counsel for defendant in error, based upon the decisions of the Supreme Court of Oklahoma Territory, and counsel for the plaintiff in error, consists in the assertion on their part that the nature and scope of the action is determined to be one of forcible entry and detainer because the plaintiff elected to commence the action in that form, rather than go into a court of general jurisdiction, where the alleged foundation of his rights could be investigated and determined; while the plaintiff in error contends that the inherent nature of the controversy determined the court in which the action must be commenced, and the scope of the remedy.

Under the decisions of the Oklahoma Supreme Court it is impossible to raise any question and have the cause transferred to the District Court, when the plaintiff asserts that the action is one of forcible entry and detainer, although, if the same action had been commenced in the District Court, no question would be presented for determination except the question of title.

We would not be disposed to so broadly admit the application of the decisions cited by counsel for defendant in error, in his motion to dismiss, if it were not for the fact that the Supreme Court of the Territory has recently placed its own

construction upon its former decisions, in language absolutely unmistakable, in the case of *Yingling vs. Redwine*, 69 Pac. 810.

As the decision just cited has not been published in any volume and is found only in the advance sheets of the West Publishing Company, Pacific Reporter No. 10, August 18th, 1902, we copy the opinion in full:

YINGLING v. REDWINE.

(Supreme Court of Oklahoma, July 18th, 1902.)

MORTGAGE—What Constitutes—Recording—Foreclosure—Parol Evidence—Possession—Cross Examination—Demurrer to Evidence.

1. Every instrument purporting to be an absolute conveyance of real estate or any interest therein, but intended as security for the payment of money, shall be deemed a mortgage, and must be recorded and foreclosed as such.

2. Parol evidence is admissible to show that an instrument purporting to be a warranty deed was in fact executed as security for the payment of money.

3. When a deed absolute on its face is shown to be a mortgage in fact, the rights of the parties to such instrument will be measured and determined by the laws governing the rights of parties under a mortgage.

4. In the absence of a specific agreement to the contrary, a mortgagee is not entitled to the possession, as against the mortgagor, although the mortgage purports on its face to be a deed absolute.

5. The latitude allowed on cross examination of witnesses is largely within the discretion of the trial court, and unless such discretion has been abused to the manifest injury of the complaining party, a cause will not be reversed for such errors.

6. The trial court should sustain a demurrer to the evidence whenever all the evidence, and the reasonable and rational inferences and deductions therefrom in favor of the plaintiff, taken as true, will not warrant a verdict for the plaintiff.

Syllabus by the court.

Error to the District Court of Pawnee County; before Justice Bayard T. Hainer.

Action by F. D. Yingling vs. W. H. Redwine. Judgment for defendant and plaintiff brings error. Affirmed.

C. J. Wrightsman and *E. M. Clarke*, for plaintiff in error.

A. J. Biddison, for defendant in error.

BURFORD, C. J.: The plaintiff in error, F. D. Yingling, brought this action in the Probate Court against the defendant in error, W. H. Redwine, for forcible detainer and to recover possession of lots one to eight inclusive, in block thirty-five in the town of Pawnee, Oklahoma. Yingling recovered judgment in the Probate Court and Redwine appealed to the District Court, trial was there had to a jury and after the plaintiff had introduced his evidence and rested the defendant demurred to the evidence. The court sustained the demurrer, discharged the jury and gave judgment against the plaintiff for costs. From this judgment the plaintiff, Yingling, appeals to this court and complains of the ruling of the trial court in sustaining the demurrer to the evidence and discharging the jury.

In October, 1898, the defendant Redwine was the owner of the real estate in question and on October 25th, 1898, conveyed the same by warranty deed to F. D. Yingling. On October 31st, 1898, by a written instrument duly executed, Yingling leased to Redwine the real estate in question, at an annual rental of $52.50, and agreed to reconvey to Redwine the real estate, at any time within the five years, on payment to him of the sum of seven hundred dollars. Redwine remained in possession of the property, and, on December 19th, entered upon the margin of the record where said lease was recorded, in the office of the register of deeds, a written release of all rights, options and privileges under said lease. On the trial of the cause the plaintiff relied upon his deed and the release

above referred to, together with proof of service of a notice to quit. The court, on cross-examination of plaintiff's witnesses, permitted the defendant to show that, at the time the deed and lease were respectively executed, Redwine was indebtd to Yingling in a considrable sum; that the deed was executed as security for the payment of a portion of said sum; and that it was agreed between the parties that Yingling would re-convey the real estate to Redwine at any time he should pay on said indebtedness, a sum equal to the agreed value of the real estate.

By Section 12, c. 8, Sess. Laws, 1897, it is provided:

"Every instrument purporting to give absolute or qualified conveyance of real estate or interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such."

Parol evidence is admissible to show that a conveyance of real estate, absolute on its face, was given as security for the payment of money, and when such proof is made, it is the duty of a court to treat such instrument as a mortgage, and determine the rights of the parties thereto as under a mortgage. The evidence in this case clearly established the fact that Redwine executed the deed to Yingling and conveyed to him the real estate as security for the payment of an indebtedness previously incurred. The lease from Yingling to Redwine was for the purpose of carrying out the plan by which Yingling was to hold the real estate as security; Redwine was to pay a rental equal to the interest on the debt and on payment of the principal Yingling was to re-convey to Redwine.

It is contended by the plaintiff in error that Redwine released his interest and rights in and under the lease and that the right of possession then reverted to Yingling. This contention would be well founded had Yingling taken an absolute title under his deed; but such was not the case, he in fact only had a mortgage on the real estate, and in the absence of a specific agreement to the contrary, a mortgagee is not ordinarily entitled to possession until after foreclosure and sale. His rights were to be measured and determined by the rights of a mortgagee and when at his request, as was shown by the evidence in this case, the lease to Redwine was, by mutual agreement, cancelled and released, Redwine was left in lawful possession of his own property.

According to plaintiff's own contention the lease executed on October 31st, 1898, was released and cancelled. Yingling testified that he paid Redwine One Hundred Dollars to induce him to cancel this lease and to execute a new one, coupled with some other conditions. It was shown that a second lease was written up and signed by the parties, by which Redwine agreed to pay rent for the real estate, and Yingling agreed to re-convey it to Redwine, on payment of One Thousand Dollars, but plaintiff denied the delivery of this lease, and introduced evidence to show that it had never been delivered. He was bound by his own testimony. If the second lease had been relied upon by plaintiff to recover for non-payment of rent, the defendant would probably have been estopped from questioning its terms; and although it, the lease, with the deed and the intention of the parties, would have together been held a mortgage, yet the right of possession would, by the terms of the agreement, have been in the

plaintiff. It is contended that the court erred in permitting the defendant to make a case on cross-examination of plaintiff's witnesses. The issue in the case was the right of possession; the plaintiff relied upon his deed and title and introduced the first lease and release of same on the margin of the record. The character of these instruments became a proper matter of inquiry, and if there was any parol agreement by the parties by which the effect was different from what was apparent on the face of the instrument we can see no serious error in permitting it to be brought out on cross-examination of the party who offers them. The question of the propriety or extent of cross-examination is one largely within the discretion of the trial court, and where there has been no abuse of such discretion, to the manifest injury of the complaining party, the cause will not be reversed.

We think there was no error in the court sustaining the demurrer when all the evidence offered by the plaintiff, with the reasonable inference and deductions therefrom, are taken as true and yet the plaintiff would not be entitled to a verdict, then the court should sustain the demurrer and discharge the jury. The evidence offered by the plaintiff showed beyond question that the deed offered in evidence was executed as security for the payment of money; that the defendant was the owner in fact; that he was in possession; that the lease by which he agreed to be a tenant of Yingling had been mutually abandoned and cancelled and that the last lease had never been executed. Under this state of facts the plaintiff was not entitled to the possession. While in this kind of an action, the title to real estate will not be tried, yet the title and the right to title as well as the character of the title of

each claimant may be inquired into sufficiently to enable the court to determine the right of possession.

The judgment of the District Court of Pawnee County is affirmed at the cost of the plaintiff in error.

All of the Justices concurring except Hainer, J., who tried the case below, not sitting, and Irwin, J., absent.

From the decision above quoted, it appears that the sole matter in controversy was the title and ownership of certain real estate in the town of Pawnee. The contention on one side being that the property was held by Yingling under a warranty deed, and that he was the absolute owner thereof, and on the other hand Rodwine contended that he was the owner of the property, and that Yingling's deed only amounted to a mortgage upon the property to secure the payment of money. If we apply to this decision the law of *res adjudicata*, as it is universally understood, at least outside of the Supreme Court of Oklahoma Territory, Yingling's deed has been determined, by this decision, to be really a mortgage. To say that the court, at the end of this expensive and tedious litigation, can determine the deed to be really a mortgage, and that another action might be immediately commenced in which the same court would be at liberty, upon the same state of facts and in a suit between the same parties, to determine the same deed to be *bona fide*, and to constitute both the legal and equitable title to the same property, and that this sort of thing could go on indefinitely, would be to countenance a course of "solemn trifling" that would hardly be consistent with a proper solemnity, when considered by any lawyer at all familiar with the principles involved.

We admit that the decisions of the Supreme Court of

Oklahoma Territory support the contention of the defendant in error, but we deny that they are in harmony with either the Organic Act, the Statutes of the Territory, sound legal principles, precedents from other courts, or common sense.

We think that *Black vs. Jackson*, 177 U. S. 349, and *Langford vs. Monteith*, 102 U. S. 145, are sufficient authority to support our contention that the title to real estate is involved in the action and that the jurisdicion of this court, on writ of error, is sustained, by reason of the fact that the land in question is worth more than five thousand dollars, as well as our contention that the judgment of the Supreme Court of the Territory of Oklahoma should be reversed and the case returned to the District Court with directions to dismiss.

See, also, *The New Orleans Pacific Railway Co. et al. vs. John D. Parker et al.*, 143 U. S. 42, 12th Supreme Court Reporter 364.

Price vs. Olds, 6 Kansas 66.

Alderman vs. Boeken, 25 Kans. 658.

Duffy vs. Rafferty, 5 Kans. 9.

Simpson vs. Boring, 16 Kans. 248.

Mooney vs. Olson, 21 Kans. 697.

Hollett vs. Ess, 31 Kans. 88.

Conway et all. vs. Gore, 27 Kans. 122.

In a later case by the Supreme Court of Kansas, cited by the Oklahoma court, in the decision complained of, the last decision referred to is given as authority for the doctrine of

the Oklahoma Supreme Court, but the decision of the Kansas court is really based upon *McDonald vs. Styles*, 7 Oklahoma 337. The difficulty with the Oklahoma decisions and the late Kansas decisions, following the Oklahoma doctrine, is that they not only ignore the general principles of law with reference to determining the nature of the action but they also nullify that part of section 4806, Statutes of Oklahoma, which provides that the action of forcible entry and detainer will lie "in cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession."

If we suppose a case directly within this statutory provision the fallacy of the doctrine complained of is at once apparent. If the plaintiff, supposing himself entitled to the possession of real estate and to be the owner thereof, begins an action of forcible entry and detainer against one holding, as plaintiff claims, without color of title, and the defendant should set forth in his answer and proceed to establish by the proof absolute and unmistakable "*color or title*," then the action of forcible entry and detainer would not lie, for two reasons: First, because of the statute just quoted, and, Second, because justices of the peace have no jurisdiction to try an action in which the title to land is in dispute or drawn in question. In the case supposed, what would the Oklahoma Supreme Court proceed to do? They do not appear to entertain the idea that the action should be dismissed before the justice of the peace, for want of jurisdiction, and such a proceeding would be in direct violation of Section 4645, Statutes of 1893, heretofore quoted, requiring such actions to be certified to the District Court where the question of title could be

properly disposed of; but they say that, if the action is branded as one of forcible entry and detainer, and commenced before a justice of the peace, it must then and forever remain an action of forcible entry and detainer, without regard to fundamental law, statutory provisions or the inherent nature of the controversy presented for adjudication.

We might also illustrate the error of the court by supposing an action of forcible entry and detainer commenced against the occupier of premises under an executed oral contract of sale, and delivery of possession, by the holder of a subsequent deed from the same grantor. Or an action commenced against the owner and occupier of premises by the holder of a tax deed alleged to be void for want of compliance with laws in relation to the issuance thereof.

Color of title does not mean good title, and the plaintiff in error in this case sets forth in his answer and establishes in the proof an unbroken chain of title to the land in question, with the exception of the alleged unlawful action of the Secretary in cancelling his homestead entry. If that entry was unlawfully cancelled it remained, in contemplation of law, valid and binding, because the decision of the Secretary upon a question of law, is not binding upon the courts, and in a proper proceeding, courts will protect the interest of parties against wrong sought to be imposed by virtue of such unlawful action on the part of the Secretary and his mistaken application of the law.

Black vs. Jackson, supra, and cases cited.

Alderman vs. Boeken, 25 Kans. 658.

In the last case the court says:

"If he, the defendant, has color of title in equity we think that is sufficient to defeat the action. Color of title in equity, without an absolute title, we think is sufficient to defeat the action; besides actions of forcible entry and detainer or forcible detainer are not to be encouraged against persons who have long been in possession of real estate, supposing that they had some kind of interest therein and who had made improvements thereon, whatever the rights or interests of such persons may be."

We are not aware that the case just quoted from has ever been overruled or even modified, and it appears to us to be in accord with sound legal principles and common justice, and the facts and law of the entire case are peculiarly applicable to the case at bar.

See, also, *Murray vs. Burris*, 42 Northwestern Reporter 25.

The case of *Langford vs. Monteith, supra*, was a writ of error to the Supreme Court of the Territory of Idaho, and the questions involved were, in principle, precisely like the present case. The language of the statute, as to the limitations upon the jurisdiction of the justice of the peace, is even more restrictive than the statute of this territory. Under the statute the jurisdiction of the justice of the peace ceases when it appears that the determination of the action "will necessarily involve the decision of a question of title," while with us it is only required that the title to land is involved or drawn in question. The case was in forcible entry and detainer, like the present, and we see no distinction in principle between the two cases. This decision of the Supreme Court of the United States has been cited in the briefs and discussed in the oral argument of the case at bar and a large number of other cases

of the same kind recently decided in the Oklahoma Supreme Court, but has never yet been referred to by the court, in any manner whatever.

The Supreme Court of the Territory mistakenly asserts that we ask the court to reverse the decision of the Department of the Interior and declare the title and ownership to be in plaintiff in error. We have made no such assertions in this case, and do not wish to be responsible for such a position We understand very well that the court cannot reverse the decisions of the Department of the Interior until after the legal title to the land has passed from the government. We think that the defendant in error is entitled under his homestead entry to possession of sufficient to enable him to make the necessary improvements and maintain a residence upon the land, in order to be entitled, if he so desires, to a patent for the land.

These rights are all that are guaranteed to him by the homestead laws of the United States, and for such purpose, the homestead entry is conclusive upon the courts, until after the legal title is vested in the entryman; but it does not follow that because the homestead entry is good for some things that it is good for everything. When the holder of the entry, which has been allowed in violation of law and without legal authority on the part of the Secretary, goes into court to recover something not granted to him by the homestead laws and not necessarily resulting from his homestead entry, he must necessarily submit his claims to investigation, the same as any other litigant, and such was the determination of this court in the case of *Black vs. Jackson*, where the same questions were presented, with the exception that the action was con-

menced in the District Court and the plaintiff in the action had unlawfully entered from a different prohibited district. That case decides, as we understand it, First, That the title to the land for the possession of which the action was brought, was in dispute, and for that reason this court had jurisdiction to consider the appeal, since the land was worth more than five thousand dollars.

Second, That the demurrer to the answer was improperly sustained, and that the defendant had a right to present his defense to a jury. Third, That it could not be presumed that plaintiff, who had only a homestead entry, would comply with all the provisions of the law and finally acquire the legal title to the land. Fourth, That the defendant had color of title and a vested interest in the property, including the right of possession, by virtue of his compliance with the laws of the United States; and that such facts might be made to appear upon the trial of the case. Fifth, That the action was triable in the District Court upon the issues as framed. Sixth, That the plaintiff might bring his action in forcible entry and detainer and recover possession of that portion held by the defendant, Black, UNLESS IT APPEARED THAT THE OFFICERS OF THE LAND DEPARTMENT ERRED AS A MATTER OF LAW, in deciding in favor of Jackson.

Of course this court can not presume that the defendant in that case could prove the facts set forth in his answer, but unless those facts CONSTITUTED A DEFENSE TO THE CLAIM OF THE PLAINTIFF, if established upon the trial, there was nothing to try, either to the court or a jury, and the ruling of the lower court, sustaining the demurrer, would

necessarily have been sustained, unless this court consider that the answer stated a good defense upon its face.

We do not apprehend that this court will determine the qualifications of the defendant in error or the effect that his entry upon the land from an Indian reservation would have upon the homestead entry, if that question had been decided by the Supreme Court of the Territory and was here presented for determination and review, because these questions as to who has the better title to the land can not be decided in a forcible entry and detainer case, as we view the law, and the Supreme Court of the Territory did not pretend to dispose of the question in this case. We contend, however, that such is the question necessarily presented for determination on account of the inherent nature of the controversy between the parties, and that such being the case the title to the land is involved and should be determined in the proper form of action, and is the only matter in controversy necessary for determination. For these reasons we think the judgment of the Supreme Court of the Territory should be reversed and the plaintiff in the court below compelled to present the case to court having jurisdiction to determine the whole controversy between the parties.

The defendant in error suggests in his motion that, since the beginning of the present action, defendant in error has submitted his final proof and received his duplicate receipt, and that for that reason the present proceeding in error should be dismissed. But we do not understand that this court will investigate facts in relation to the rights of the parties, subsequent to the appeal or even to the beginning of the action, unless those facts were put into record in the lower court by

supplemental plea, and that the rights of the parties relate to the beginning of the action in the lower court; but if we admit that the facts are properly presented for the consideration of this court, and even if they existed at the time of the beginning of the action in the lower court, the situation would be in no manner changed or modified.

It would still be a question and controversy as to the ownership of the land.

Defendant in error also suggests that an action in ejectment is now pending between the same parties and that all questions in relation to the title can be adjudicated in that action. The complaint in the present case contains every allegation necessary for a petition in ejectment under our system; the answer contains all the facts that could possibly be presented in such a case, and it is admitted that the same pleading upon the same facts, in a different court, would necessarily present a case for the determination of title, and at the same time defendant in error contends that these same pleadings upon the same facts, by virtue of the wisdom of the plaintiff in selecting a justice of the peace, instead of a court of competent jurisdiction to try the case, presents no question of title and that title is in no manner involved or presented for adjudication. If this is law, it is indeed strange.

The secret source of this contention is to be found in the multitude of cases that have found their way into the Supreme and inferior courts of the Territory, upon questions of this character wherein it is sought to evade the real question involved in the controversy by ousting the lawful claimants and entrymen from possession, and permitting a sale or transfer of the land, to an innocent purchaser. The parties have

sought to accomplish, indirectly, what they have dreaded to undertake by direct proceedings.

As we have before stated we do not understand that the court would be authorized to adjudicate the question as to who has the lawful claim to the land in controversy in this proceeding in error, but we submit a few suggestions upon the merits of the real controversy in order to show that our contention as to the ownership of the land is not without foundation and that it is made in good faith and for the *bona fide* purpose of protecting what we believe to be our just and lawful rights. Of course, if this court should feel disposed to adopt the dictrine of *Yingling vs. Redwine*, and try and determine the question of title and ownership in this form of action, it would be necessary to consider the merits of our claims.

SUGGESTIONS ON THE MERITS.

The qualification of intending settlers upon these lands does not necessarily have any reference whatever to the description of the actual tracts and parcels of land opened for occupancy of such settlers. The qualification of settlers is described and defined in the various acts of Congress, including the act opening the Cherokee Outlet to settlement, and the proclamation of the president issued pursuant thereto. The lands actually opened to occupancy were such as had become the absolute property of the United States, free from all Indian claims of title or right of occupancy, and such as were not reserved from public settlement. The only confusion that can possibly arise in reference to the construction of the law and proclamation is on account of confounding the qualifications of settlers with the description of lands actually

opened to occupancy. When the question of qualification is entirely separated from the other question and considered alone in the light of the plain, positive and unmistakable language of the Act and Proclamation there is no possible room for controversy in the matter. We have nothing to do with the reasonableness of one theory or the other with reference to the construction of this act and proclamation so long as the plain meaning, intent and purpose of the law is ascertainable from the reading of the law itself.

It was the intention and purpose of the Government to open to settlement all the lands lying west of the 96th degree and by the act of March 2, 1899, section 14, it is provided:

"Section 14. The president is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, etc."

See "Executive Document No. 78, 51st Congress, first session. Letter from the Secretary of the Interior transmitted in response to senate resolution of March 10, 1890, the compilation concerning the legal status of the Indians in Indian Territory."

All the lands lying west of the 96th degree were referred to and considered in the Act of Congress with reference to opening the same to settlement, and the proclamation of the President, and were, in all such acts, proclamations or other public papers, tretatd as the country "known as the Cherokee Outlet,' and describe by metes and bounds, and all of said country was opened to settlement except certain exceptions specified in the proclamation, which included such lands as treaties had not been completed for, as well as all public reservations, etc.

The prohibition contained in the Act of Congress is that "no person shall be permitted to occupy or enter upon any of the lands *herein referred to* except in the manner prescribed by the proclamation of the president opening the same to settlement and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands."

By reference to other sections of the act it will be seen that the entire body of land lying west of 96 was referred to and described by metes and bounds, and the proclamation of the president, although excepting certain lands from settlement and occupancy because treaties had not been completed, and for other reasons, did not grant permission to anyone to enter upon any of the lands referred to in the Act of Congress. The act made provision for opening all of the land west of 96 if treaties had been completed prior to the opening thereof. It was evidently the intention of congress to avoid controversies which arose with reference to the opening of Old Oklahoma, and which were discussed in *Smith vs. Townsend*, by clearly and definitely describing the country referred to by metes and bounds and avoiding any possible contention that persons might enter or collect upon any portion of the body of lands referred to which should not be opened for homestead settlement. The act stated, by express terms, what the former act was construed to mean, that is, that it was "the evident intent of congress by this legislation to put a wall around this *entire territory* and disqualify from the right to acquire under the homestead laws any tract within its limits every one who was not outside of that wall at the hour of opening."

The proclamation of the president described the country by metes and bounds in the same manner as the Act of Congress and in all acts and proclamations it was referred to as the "country known as the Cherokee Outlet" and with reference to the 100-foot reservation the proclamation provided that "said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." The description given in the act and proclamation do away with the necessity of investigating all technical questions as to just what lands did or did not constitute the Cherokee Outlet proper or what was occupied or unoccupied, because the country dealt with in the act and proclamation was the same piece of country referred to in section 14 of the act of March 2, 1889, and the descriptions by metes and bounds and other designations dealt with that country wholly, and all parts thereof which were not open to homestead settlment were included in the exceptions mentioned in the Proclamation. Again the Proclamation declares that notice is especially given that no person shall be permitted to occupy or enter upon any of the lands *therein referred to.* Certainly all of the lands west of 96 were referred to in that Proclamation and were particularly described by metes and bounds, coupled with the designation of the same as the country "known as the Cherokee Outlet."

The act described the lands acquired from the Cherokees as being bounded on the north by the state of Kansas, on the west by the public land strip and the state of Texas on the south by the Territory of Oklahoma and the Cheyenne and Arapahoe Indian reservations, and *on the east by the 96th degree*, and immediately following this description "*the lands*

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referred to being commonly known and called the Cherokee Outlet."

There would seem to be a controlling affinity between the expression "the lands referred to being *commonly called the Cherokee Outlet,"* and the repetition of the same expression "any of the lands referred to," and that obviously the first use of the expression is a definition or antecedent of the second. A word or expression repeatedly used in a statute will bear the same meaning throughout the statute unless a different intention appears.

Sutherland on Statutory Construction, section 255.

Pitt vs. Shipley, 46 California 154.

County Seat of Linn County 15 Kans. 500.

The construction of these acts and proclamations contended for by persons who entered upon the lands described by metes and bounds prior to the time of opening would place in the statute by construction the provision: "*all* persons are permitted to enter upon any portion of the lands referred to in the Act of Congress and this proclamation except such portions as are actually opened to occupancy as town lots or homestead claims." We believe such a contention is absurd in the face of the language of the act and the evident intention thereof, considered in the light of the decision of the Supreme Court of the United States in *Smith vs. Townsend.*

The 100 foot reservation is as positively fixed around the entire tract of country *referred to in the act and proclamation* as though the boundary description had been repeated with every reference thereto throughout the Act or Proclamation.

It is a well known fact and one which the Court should take judicial notice of in this case under the authority of *Smith vs. Townsend*, that the Act and Proclamation were almost universally construed to mean just what they state, that is, that the entire tract of country west of 96 was referred to and that no one would be permitted to enter upon the same prior to the hour of opening and this related to the qualification of settlers only, regardless of the description of the lands opened to settlement. Such was the understanding of the Departments of the Government. Booths were established with reference to such construction. The military officers of the United States were directed to forcibly exclude all persons from any portion of the entire body of land and no one was permitted to go upon any of the excepted territory and no one did go upon it except such as were able to evade the viligence of the Troops and United States Officers and, as we believe, such as intended to make affidavit at the proper time or testify in any proceeding that they actually entered upon the land occupied as a homestead, from the outer boundary of the entire tract of country. It is certainly true that something like 150,000 people collected upon the boundaries of this country as compared with probably 25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out and then sneaked across the river at the hour of opening and claimed land as homesteads and confessed the manner of entry after the facts were known.

Inquiries were made of the Secretary of the Interior with reference to his construction of the act as shown in *Cagle vs. Mendenhall*, 20 L. D. 446. and such persons were advised by telegram that no one would be permitted to enter except from

the outer boundary of the entire tract of country. Such was the construction of the law for a long time after the opening and until after plaintiff in error had acquired rights in the land in question, and such contemporaneous construction should receive great weight even though the court should be of the opinion that the Act of Congress and the Proclamation do not plainly express their intent and purpose in accordance with such construction. The history of this question in the land department is somewhat peculiar. In Cagle vs. Mendenhall the act of Congress and Proclamation of the President are not discussed, but Cagle was held disqualified because he entered upon the land in violation of a telegram from the Secretary to Mendenhall. The case of Welsh vs. Butler, 21 L. D. 369 held that entry from the Chilocco School reservation was not unlawful because such reservation was not contemplated in the telegram to Mendenhall, and again the Act of Congress and Proclamation of the President are overlooked. The ruling of the Department with reference to the Indian Reservations other than the Chilocco School was reversed in Brady vs. McDonald and it was there held that the Act of Congress and Proclamation of the President fixed the qualification of settlers and that such qualifications could not be altered by telegram from the Secretary. The doctrine of Welsh vs. Butler, however, based upon the theory that that reservation was not included in the telegram, remains unshaken to this day.

In Brady vs. McDonald, the decision is based upon the assumption, without any discussion, that the country known as the Cherokee Outlet, and which was bounded on the east in the Act of Congress and Proclamation of the President,

by the 96th degree, was in fact bounded on the east by the Arkansas River.

It will be noticed that such eastern boundary was never referred to in any Act of Congress, Proclamation of the President or decision of any court, prior to this decision of the land department.

Decker vs. A. T. & S. F. R. Co. 3 Oklahoma 553.

U. S. vs. Pridgeon, 153 U. S. 48.

The act of May 2, 1898, 23 Statutes at Large 81, provides that "all the Indian Territory, except so much of the same as is actually occupied by the five civilized tribes and the Indian tribes within the Pawpaw agency and *except the unoccupied part of the Cherokee Outlet together with all that part of the United States known as the public land Strip, is hereby erected into a temporary government, etc.*"

By Section 9 of the same Act the lands west of the Arkansas River are referred to as "that portion of the *Cherokee Outlet* not embraced within the boundaries of said Territory of Oklahoma." Other instances of the specific use and definition of the expression "Cherokee Outlet" are found in the treaty of 1835, 7 Stat. 578, patent to the Cherokees of this tract, Senate Document 124, 46th Congress, second session. Opinion of Assistant Attorney General Shield, Senate document No. 57, 52 Congress page 20, and the treaty of 1828 in which the Cherokee Nation was guaranteed a "perpetual outlet west," etc.

It is clear that the "country known as the Cherokee Outlet" meant all the country lying west of 96 and between the north and south boundaries thereof. So that the "lands

herein referred to" and the 100 foot boundary "around and within the outer boundary of the entire tract of country known as the Cherokee Outlet" would be plain and unmistakeable even without the definite and postive boundary description given in the Acts of Congress and proclamation of the President. The term "the entire tract of country herein referred to" must necessarily include each and every part and parcel of all and every tract referred to in the act and proclamation. If a tract of country bounded on the east by the 96th degree is referred to in the Act and Proclamation, which it unquestionably is several different times, then the meaning of the term last quoted is unmistakable.

Jordan vs. Goldman 1st Oklahoma 427, is a case discussing the boundaries and what is understood by the "Cherokee Outlet."

Again an even and unbroken border would better serve the purpose and intention of the act and proclamation and would make it more easy of protection and from intrusion. A glance at the map showing the uneven and broken nature of the boundaries of the lands actually opened to homestead settlement is sufficient of itself to justify the interpretation of the law by the department at the time of the opening, even though the language of the act of Congress and proclamation were actually indefinite and uncertain. If these reservations on the east could be occupied because they were not opened to settlement, all the school and college reservations which happened to come in contact with the outer boundary would likewise be exempt from the prohibition and we see no reason why the reservations for public roads at every section line and public reservation in the interior accessible therefore

might not have been covered with settlers prior to the hour of opening with the same reason and justification.

So far as the ordinary law of land boundaries offers an analogy, if there were a conflict or discrepancy between the two expressions used in the Act and Proclamation, that which carries with it precise and geographical certainty, would, in all cases, be held to be controlling.

Smith vs. Strong, 14 Pick. 128.

Whiting vs. Dewey, 5 Pick. (Mass.) 428.

Dana vs. Middlesex Bank, 10 Metc. (Mass.) 250.

Howell vs. Saul, 5 Monroe, 410.

Barney vs. Miller, 18 Ia. 466.

Jones vs. Smith, 73 N. Y. 205.

Gans. vs. Aldridge, 27 Ind. 294.

McEowen vs. Lewis, 26 N. J. L. 451.

Holmes vs. Trout, 7 Pet. 121.

Crogan vs. Nelson, 44 U. S. 187.

Ship vs. Miller's Heirs, 2 Wheat, 316, 29 Pac. 491.

Even a general description where definite and certain will control a special description where indefinite and uncertain.

Martin vs. Lloyd, 94 Cal. 195.

Herrick vs. Hopkins, 23 Me. 217.

Sawyer vs. Kendall, 10 Cush. (Mass.) 241.

West vs. Bretell, 115 Mo. 653.

Respectfully submitted,

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